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IN THE

SUPREME COURT OF THE UNITED STATES

October Term

No. 79-43

STATE OF OHIO,
Respondent,

vs.

JAMES J. BOBULSKI,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for Franklin County, Ohio is adequately set out in the petition. The judgment of the Ohio Supreme Court declining a motion for leave to appeal is adequately set out in the petition.

JURISDICTION

Jurisdiction is adequately set forth in the petition, 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

I. WHERE PETITIONER CONDUCTS A DRUG TRANSACTION WHILE SITTING IN FRONT OF AN UNOBSTRUCTED BAY WINDOW IN PLAIN VIEW OF A SIDEWALK WHICH PROVIDES ACCESS TO THE PUBLIC TO THE APARTMENT COMPLEX, DOES HE HAVE A REASONABLE EXPECTATION OF PRIVACY WHEN HE IS OBSERVED BY A POLICE OFFICER LAWFULLY ON THAT SIDEWALK?

II. MAY EVIDENCE WHICH IS FOUND IN PLAIN VIEW BY A POLICE OFFICER INCIDENT TO A LAWFUL ARREST, AND IN DANGER OF BEING DESTROYED, BE PROPERLY SEIZED WITHOUT A SEARCH WARRANT?

III. SHOULD STATEMENTS MADE BY PETITIONER TO THE POLICE, FOLLOWING A LAWFUL ARREST AND AFTER A KNOWING INTELLIGENT AND VOLUNTARY WAIVER OF HIS CONSTITUTIONAL RIGHTS AS STATED IN *MIRANDA* V. *ARIZONA*, 384 U.S. 436 (1966), BE ADMISSIBLE INTO EVIDENCE DURING A TRIAL AGAINST HIM?

STATEMENT OF THE CASE

The trial court overruled petitioner's motion to suppress evidence and he entered a plea of no contest to

trafficking in marijuana. The Court of Appeals affirmed the judgment in a unanimous decision, and the Ohio Supreme Court overruled petitioner's motion for leave to appeal finding no substantial constitutional issue was involved. Petitioner now seeks this Court to grant a Writ of Certiorari.

On the morning of October 26, 1977, Columbus Police Officers assigned to the Narcotics Bureau conducted a surveillance on 28 East Sherman Avenue and observed petitioner enter the ground floor of an apartment carrying a gym bag and a guitar case. One of the officers walked on the complex sidewalk which provides access to the public to the apartments. From the sidewalk he observed petitioner and a co-defendant in his plain view through an unobstructed large window, inspect three large bags containing a brownish substance.

Recognizing the material as marijuana, the officer knocked on the door. He got no response to his knock but heard scurrying around inside. He stepped back to the sidewalk, looked and saw the co-defendant gather up the bags of marijuana and rush to the rear of the apartment. The co-defendant was apprehended by another officer as he ran out the back door. The officers observed the bags of marijuana on the floor in the kitchen, and entered the apartment to seize it and arrest petitioner. One of the officers then went through the apartment to secure it and found the guitar case beside the gym bag which was on the floor, open, and were observed to contain several thousand amphetamines and barbituate drugs.

ARGUMENT I

WHERE PETITIONER CONDUCTS A DRUG TRANSACTION WHILE SITTING IN FRONT OF A BAY WINDOW WITH THE DRAPERIES OPEN IN FRONT OF A SIDEWALK, HE HAS NO REASONABLE EXPECTATION OF PRIVACY AND CONSEQUENTLY THERE IS NO CONSTITUTIONALLY IMPERMISSIBLE SEARCH WHEN HE IS OBSERVED BY A POLICEMAN.

The Fourth Amendment protects people, not places, and that what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *Katz* v. *United States,* 389 U.S. 347, 351, 88 S. Ct. 507, 511 (1967), and again in *United States* v. *Santana,* 427 U.S. 38, 42, 96 S. Ct. 2406, (1976). Mr. Justice Harlan stated in his concurring opinion in *Katz* that for a person to claim the benefit of the Fourth Amendment protection, he must have exhibited an actual (subjective) expectation of privacy, and that the expectation be one society is prepared to recognize as reasonable. A man's home, for most purposes, is a place where he expects privacy, but objects, activities or statements that he exposes to the "plain view" of outsiders are not protected because no intention to keep them to himself has been exhibited. *Katz.,* at 361.

Petitioner had no reasonable expectation of privacy in this matter. The police officer was able to freely pass through the gate of a short chain link fence and along the sidewalk. The Court of Appeals of Ohio noted the sidewalk provided free access to the public to the apartment complex. From the sidewalk the police officer

readily observed in his plain view through an unobstructed large ground floor window, petitioner and his co-defendant conduct what appeared to be a drug transaction.

The various courts have repeatedly found that a person has no reasonable expectation of privacy where a government agent sees or hears matters occurring within an apartment unaided from a common area outside that apartment. *United States* v. *Llanes,* 398 F. 2d 880 (2nd Cir., 1968); *United States* v. *Wilkes,* 451 F. 2d 938 (2nd Cir., 1971) (voices clearly audible in hallway); *United States* v. *Coplen,* 541 F. 2d 211 (9th Cir., 1976) (government agent observed marijana debris through an airplane window); *Ponce* v. *Craven,* 409 F. 2d 621 (9th Cir., 1969) (police officers observed criminal activity through a motel window while standing in the parking lot).

In *United States* v. *Carriger,* 541 F. 2d 545 (6th Cir., 1976), which petitioner cites, the court suppressed evidence discovered by a government agent in the hall of an apartment building. It is important to note there the government agent surreptitiously entered the locked building, and the appellant had a reasonable expectation of privacy in the locked building.

Petitioner also relies on the decision in *Fixel* v. *Wainwright,* 492 F. 2d 480 (5th Cir., 1974). *Fixel* concerns a dopkit containing heroin which was seized in a fenced in backyard. The court there noted the backyard of Fixel's home was not a common passageway normally used by the building's tenants for gaining access to the apartments, nor is it an area open as a corridor to salesmen or other businessmen who might approach the tenants in the course of their trade. That court distinguished this

case from *United States* v. *Freeman,* 426 F. 2d 1351 (9th Cir., 1970) where it found the common stairway and common porches of a multi-tenanted apartment house are not within the "curtilage" of each tenant. *Freeman,* at 1353. It can be seen the common sidewalk in the matter at hand falls under *Freeman, supra.,* and not *Fixel, supra.*

For the foregoing reasons, petitioner's first argument fails to present a substantial constitutional question. It is respectfully submitted that the Writ of Certiorari should not issue on this question.

ARGUMENT II

EVIDENCE WHICH IS DISCOVERED IN PLAIN VIEW OF THE POLICE OFFICER MAY BE SEIZED WITHOUT A WARRANT AS CAN EVIDENCE WHICH MUST BE SEIZED DUE TO THE EXIGENT CIRCUMSTANCES EXISTING AT THE TIME.

The existence of exigent circumstances where evidence is in danger of being removed or destroyed, has carved an exception into the requirement that a search warrant be obtained before that evidence is seized. See e.g. *Schemerber* v. *California,* 384 U.S. 757 (1966). Police observed petitioner's co-defendant attempt to flee with the three bags of suspected marijuana as he knocked on the door. The officers then apprehended the co-defendant in the back of the residence and saw the three bags on the floor in the kitchen. The officers properly entered the apartment to seize the drugs and arrest the petitioner who was still inside.

In all of the cases petitioner cites there is no likelihood

the evidence would have been destroyed before the police could get a search warrant. However, that danger was strongly present in this matter and the exigent circumstances were not created by the police.

The Court of Appeals noted that even if the exigent circumstances had not existed, the seizure of the evidence was proper incident to a lawful arrest. The officers were experienced in working with narcotics, and a reasonable person was entitled to believe petitioner was trafficking in marijuana.

The Ohio Supreme Court has stated in *Dixon* v. *Maxwell*, 177 Ohio St. 20 (1964):

> A search without warrant incident to and contemporaneous with a valid arrest does not violate the constitutional prohibition of illegal search and seizure. Also, such right to search extends to the premises upon which the arrest is made, and the evidence procured in such search is admissible.
>
> *Draper* v. *United States*, 358 U.S. 307; *Preston* v. *United States*, 84 S. Ct. 881; *Harris* v. *United States*, 331 U.S. 145; *United States* v. *Rabinowitz*, 339 U.S. 56; and annotation, 4 L. Ed. 2d 1982.

While the officers were arresting petitioner and securing the apartment they noticed the guitar case and gym bag in plain view in the middle of the living room floor. The gym bag was open and contained several thousand amphetamines and barbituate drugs, and their incriminating nature was immediately apparent. The seizure of these

drugs came under the plain view exception which applies where:

> . . . (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities.
>
> *State* v. *Williams*, 55 Ohio St. 2d 82, (1978), syllabus paragraph one. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464-471 (1971).

The police officers did not conduct a more general search than the exigent circumstances required, and the seizure of the evidence was reasonable under the circumstances.

For the foregoing reasons, this second argument presents no substantial constitutional question. It is respectfully submitted that the Writ of Certiorari should not issue on this question.

ARGUMENT III

WHERE A CRIME IS PROPERLY OBSERVED BY A POLICE OFFICER AND THE SUSPECT KNOWINGLY AND VOLUNTARILY WAIVED HIS *MIRANDA* RIGHTS, STATEMENTS MADE TO POLICE ARE PROPERLY ADMISSIBLE INTO EVIDENCE DURING A CRIMINAL TRIAL.

As noted, the actions of the police officers were not unreasonable and were in compliance with constitutional

requirements. Petitioner conceded during the suppression hearing that he was informed of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that he acknowledged and understood these rights, and subsequently executed a waiver of those rights.

For the foregoing reasons, this third argument presents no substantial constitutional question. It is respectfully submitted that the Writ of Certiorari should not issue on this question.

CONCLUSION

Petitioner had no reasonable expectation of privacy while he conducted a drug transaction in plain view of a police officer who could readily observe him through an unobstructed window from a sidewalk which provides public access to the apartment complex.

The drugs were properly seized by the police officers due to the exigent circumstances at hand. They were taken incident to the petitioner's lawful arrest, and the drugs in the living room were in plain view of the police when the apartment was secured.

The statements made by petitioner to the police were pursuant to his lawful arrest, the proper seizure of evidence and his intelligent and voluntary waiver of his right to remain silent and have an attorney present.

It is respectfully submitted that in light of the decisions

of this Court and the courts of those several jurisdictions cited within, that the Writ of Certiorari should not issue.

Respectfully submitted,

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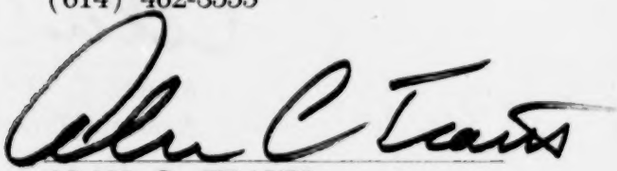

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CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(b) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon William J. Abraham, 24 North High Street, Columbus, Ohio 43215, this 2nd day of August, 1979, by United States mail, postage paid, and that all parties required to be served have been served.

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